STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Donofrio and Jansen, JJ., Saad, PJ., dissenting

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

v

TERRY NUNLEY
Defendant-Appellee

and

ATTORNEY GENERAL,
Intervenor **No. 144036**

L.C. No. 10-001573-AR
COA No. 302181

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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Statement of the Question

I.

Is a certificate of mailing of a notice of license suspension testimonial, so that it may not be admitted without accompanying witness testimony regarding the mailing ?

Amicus answers: "NO"

Statement of Facts

Amicus joins the Statements of Facts of the People of the State of Michigan, and the Attorney General as intervenor.

Argument

I.
The certificate of mailing of a notice of license suspension is not testimonial, and may be admitted without accompanying witness testimony regarding the mailing without violation of the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence."[1]

A. Introduction

In granting leave to appeal this court directed that the parties address "whether the Court of Appeals erred when it held that the Department of State certificate of mailing is testimonial in nature and thus that its admission, without accompanying witness testimony, would violate the Confrontation Clause." The answer to that question is that the Court of Appeals erred, and that the certificate of mailing is thus admissible without accompanying testimony—and there would *be* no testimony from any live witness that a particular notifice of suspension was mailed by the clerk who mailed it in any event, there being no possibility that a mailing clerk would remember a particular certificate out of thousands and thousands of suspension notices mailed, when completing this ministerial task.

Amicus joins in the excellent analyses by the People of the State of Michigan and by the Office of Attorney General of the State of Michigan as intervenor, and sees no point in here

[1] Erwin N. Griswold, "The Due Process Revolution and Confrontation," 119 U. Pa. L. Rev. 711, 714 (1971).

covering at length the points made in those fine arguments. Amicus will thus focus on a few narrow points.

B. Certificates of Mailing Are No More Testimonial Than Medical Reports, Documents Showing Chain of Custody, and Instrument Maintenance Records

Michigan statute, MCL § 257.212, provides the mandatory methods by which the Secretary of State's Office shall provide notice, where that Office is required to send a notice to a citizen:

> If the secretary of state is authorized or required to give notice under this act or other law regulating the operation of a vehicle, unless a different method of giving notice is otherwise expressly prescribed, notice shall be given either by personal delivery to the person to be notified or by first-class United States mail addressed to the person at the address shown by the record of the secretary of state. The giving of notice by mail is complete upon the expiration of 5 days after mailing the notice. Proof of the giving of notice in either manner may be made *by the certificate of a person 18 years of age or older, naming the person to whom notice was given and specifying the time, place, and manner of the giving of notice* (emphasis supplied).

Even independent of the statutory provision that the certificate constitutes proof of the giving of notice, the certificate constitutes a public record under MRE 803(8), allowing admission of *"*Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, ..." It also constitutes a business record under MRE 803(6), which provides for admission of "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data

compilation, all as shown by the testimony of the custodian or other qualified witness, *or by certification* that complies with a rule promulgated by the supreme court o*r a statute permitting certification*, ..."

The Court of Appeals relied heavily on *Melendez-Diaz v. Massachusett*s,[2] which held that a laboratory report detailing findings of a drug analysis conducted for the purpose of prosecution was, where unaccompanied by testimony from laboratory personnel who conducted the testing, testimonial, and its admission in violation of the confrontation clause. But *Melendez-Diaz* does not hold that every document recording the carrying out of some ministerial task of a member of an administrative agency is testimonial—it did not abrogate either the public records or business records hearsay exceptions provision that the declarant's availability is "immaterial." Indeed, the Court said:

> . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.[3]

Additionally, the Court said that "medical reports created for treatment purposes . . . would not be testimonial under our decision today,"[4] and obviously medical reports created for treatment

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[2] *Melendez-Diaz v. Massachusetts*, 557 US 305,129 S.Ct. 2527, 174 L Ed 2d 314 (2009).

[3] 129 S Ct at 2532.

[4] 129 S Ct at 2533. And a number of courts have thus held that medical reports are not testimonial. See e.g. *Bowling v. State*, 717 S.E.2d 190, 198 (Ga.,2011); *Green v. State,* 22 A.3d 941, 954 (Md.App.,2011); *Commonwealth v. McLaughlin*, 948 N.E.2d 1258, 1264 (Mass.App.Ct.,2011); *Sanders v. Commonwealth*, 711 S.E.2d 213, 219 (Va.,2011) ("Dr. Clayton's medical examination of CL served a dual purpose: (1) to gather forensic information to investigate and potentially prosecute a defendant for the alleged offenses and (2) to obtain information necessary for medical diagnosis and treatment of the victim. The laboratory report

purposes may contain material offered for its truth that is critical to the proof of an element of an offense.

And so it is that courts considering whether such items as certificates of mailing and certificates of service are testimonial and so violate the confrontation clause when offered against the accused have held not. For example, in *State v. Tryon*[5] the court held that a return of service of a restraining order—service of the restraining order obviously being critical to a prosecution for contempt for a violation of the restraining order—was not testimonial.

> Further, unlike in *Melendez–Diaz,* the statutes that required production of the return of service in this case, ORS 124.020(7)(b) and ORS 124.030(1), demonstrate that the statement contained in the return of service was made for the purpose of "administration of an entity's affairs." *Melendez–Diaz,* —— U.S. at ——, 129 S.Ct. at 2539. Under ORS 124.020(7)(b), the county sheriff or another peace officer—in this case a deputy sheriff—has a legal duty to personally serve a restraining order and to make proof of that service. After the person against whom the restraining order issues receives notice of its issuance, ORS 124.030(1), in turn, authorizes entry of the restraining order into the Law Enforcement Data System, which informs law enforcement agencies of the existence of the restraining order.[6]

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was for medical treatment purposes as it was created to permit Dr. Clayton to medically diagnose and treat CL for sexually transmitted infections. Because reports created for medical treatment purposes are nontestimonial, Sanders' Sixth Amendment right to confront witnesses against him was not violated"); *State v Smith*, 791 NW2d 712 (Iowa App, 2010). Amicus is aware that in *People v Fackelman*, 489 Mich 515 (2011). this court held that a medical report—or at least references to the diagnosis contained in that report—by a treating physician, who would have created such a report no matter the circumstances of the arrival of his patient, and who was not preparing a report pursuant to court referral for criminal responsibility or competency—was testimonial. But the case does not stand for the proposition that *all* medical reports prepared by treating physicians are testimonial, and it is to be hoped that *Fackelman* is limited to its rather unusual facts.

[5] *State v. Tryon,* 255 P.3d 498 (Or.App.,2011).

[6] 255 P.3d at 500.

The court found that the return was not prepared in response to request by law enforcement during the course of an investigation, but was issued in accordance with routine, non-adversarial tasks. So here.

Similarly, in *Commonwealth v. Shangkuan*[7] the court also considered use of a return of service in a case involving prosecution for violation of a "notice of abuse prevention":

> It is true that a return of service might be used in a later criminal prosecution to furnish proof that the defendant was on notice of the abuse prevention order entered against him. When so used, returns are the functional equivalent of the serving officer's live testimony. In this sense they bear some resemblance to the drug analysis certificates in *Melendez–Diaz.* Unlike the drug certificates at issue in *Melendez–Diaz,* however, a return of service is not created solely for use in a pending criminal prosecution. . . . . For this reason, it is not testimonial for purposes of the confrontation clause.[8]

With regard to certificates of mailing, the Attorney General's brief discusses *Commonwealth v Parenteau*,[9] and *State v Murphy*,[10] and amicus concurs with the cogent explanation of the cases there given.[11]

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[7] *Commonwealth v. Shangkuan*, 943 N.E.2d 466, 472 - 473 (Mass.App.Ct.,2011).

[8] 943 N.E.2d 466, 472 - 473.

[9] 948 N.E.2d 883 (Mass., 2011). *State v. Jasper,* 2012 WL 862196(Wash.,2012) is distinguishable from the present case in the same manner the Attorney General distinguishes *Parenteau*; that is, the certificate that a search of records revealed that defendant's driving privileges had not been reinstated was prepared after criminal charges were brought and for the purposes of litigation.

[10] 991 A.2d 35 (ME, 2010).

[11] See Brief of the Attorney General, at 29-31.

C. Conclusion

The principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations used as evidence at trial in the absence of the in-court testimony of the declarant. But this focus also suggests that not all hearsay implicates the Confrontation Clause; the admission of out-of-court statements from unavailable declarants where the statements occurred in situations that bear "little resemblance to the civil-law abuses the Confrontation Clause targeted"[12] is left to the law of evidence of the federal system and the various states.[13] Formal witness statements in the investigation of a crime, and statements made during police interrogations, and laboratory reports prepared for the purposes of prosecution, all closely resemble the civil-law practices of trial by affidavit and deposition to which the confrontation clause is directed. But records of the activity of a government office—that a notice was mailed—created before any crime was even committed, hardly falls within these categories of "civil-law abuses."

Professor Akhil Reed Amar concludes that to read "witness against" as referring to witnesses actually testifying in court, and also to such materials as videotapes, transcripts, depositions, and affidavits, *when prepared for court use and introduced as testimony*, is consistent with the text of the confrontation clause, its context within the Constitution, and with history.[14] Amicus agrees. The certificate here, while it may *have* a court use, was not prepared

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[12] *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364, 158 L Ed 2d 177 (2004).

[13] 124 S Ct at 1374.

[14] Akhil Reed Amar, *The Constitution and Criminal Procedure* (Yale University, 1997),129-130. And see *State v. Snowden*, 867 A.2d 314, 324 (Md.,2005), noting that the civil-

for court use, as there was no proceeding pending in which to offer it, and indeed, not even a crime that had occurred when it was created that could have led to its use in a prosecution.

The Confrontation Clause was designed to have a limited, though extremely important, role. A particular practice, that of the government gathering evidence through ex parte depositions and affidavits, and then admitting that evidence at trial without presenting the witnesses, was banned. Those modern practices which are closely akin this banned civil-law practice are also prohibited, so that when the government engages in formal or structured questioning of an individual, who "bears witness" with a solemn or formal statement, that testimonial statement is inadmissible under the Confrontation Clause unless the declarant testifies, and when, for the purposes of investigation or prosecution, a laboratory technician analyzes a substance and prepares a report as to its identity, that report "bears witness" given the circumstances of its making and is sufficiently akin to trial by affidavit as to be excluded by the confrontation clause. Not so a record kept of the mailing of a notice by the government to a citizen that his driving license has been suspended.[15]

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law abuses "share a common nucleus in that *each involves a formal or official statement made or elicited with the purpose of being introduced at a criminal trial*....Although these standards focus on the objective quality of the statement made, the uniting theme underlying the *Crawford* holding is that *when a statement is made in the course of a criminal investigation initiated by the government*, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant.

[15] Amicus would note that "machine print-outs" of certain materials have been held nontestimonial. See *People v. Dinardo*, 290 Mich.App. 280, 290 (2010), holding that the "Datamaster ticket, "showing the breath-test procedures and defendant's specific blood alcohol level," did not amount to a "testimonial" statement. It is, amicus believes, entirely possible that the mailing of suspension notices and the record of mailing could at some time be accomplished by machine. It would be an odd circumstance if the record of mailing was not testimonial at that time, but testimonial when a person makes a record of the mailing.

Relief

Wherefore, amicus submits that the Court of Appeals should be reversed.

Respectfully submitted,

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